

1 Robert M. Linn (State Bar # 190387)
rlinn@cohenlaw.com
2 COHEN & GRIGSBY, P.C.
625 Liberty Avenue
3 Pittsburgh, PA 15222-3152
Phone: (412) 297-4900
4 Fax: (412) 209-0672

5 Attorneys for Defendant
6 Guardian Protection Services, Inc.

7
8 UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10 CLARICE TUCK,

11 Plaintiff,

12 v.

13 GUARDIAN PROTECTION
14 SERVICES, INC.,

15 Defendant.

CASE NO. 15-CV-1376-JLS(JLB)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION TO
DISMISS FOR FAILURE TO
STATE A CLAIM**

16 Date: January 21, 2016
17 Time: 1:30 p.m.
18 Ctrm: 4A
19 Judge: Hon. Janis L. Sammartino

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTS	2
III. STANDARD OF REVIEW	3
IV. DISCUSSION.....	3
A. Plaintiff’s Amended Complaint Makes Clear That Her Claims Are Merely a Subterfuge Through Which Plaintiff Hopes to Address a Grievance With Guardian’s Authorized Dealer.	3
B. Plaintiff Has Failed to State a Claim Under the Telephone Consumer Protection Act.	6
1. Plaintiff provided express written consent to receive the calls.	6
2. Plaintiff has failed to allege the use of an automatic telephone dialing system or an artificial or prerecorded voice.	9
C. Plaintiff Has Failed to State a Claim Under the Federal Fair Debt Collection Practices Act.	12
1. Plaintiff’s claims under the Federal Fair Debt Collection Practices Act must be dismissed because Plaintiff has failed to allege that Guardian is a “debt collector” within the meaning of the Act.....	12
2. Plaintiff has not alleged a violation of § 15 U.S.C. § 1692c(a)(1).....	15
3. Plaintiff failed to state a claim for violation of 15 U.S.C. § 1692d(5).	16
4. Plaintiff has failed to state a claim for violation of 15 U.S.C. § 1692d(6).	17

Page

5.	Plaintiff has failed to state a claim for violation of 15 U.S.C. § 1692e(10).	18
D.	Plaintiff Has Failed to State a Claim Under the California Rosenthal Fair Debt Collection Practices Act.	19
V.	CONCLUSION	21

TABLE OF AUTHORITIES**Page(s)****Cases**

<u>Arteaga v. Asset Acceptance, LLC</u> , 733 F. Supp. 2d 1218 (E.D. Cal. 2010)	16, 20
<u>Ashcroft v. Iqbal</u> , 556 U.S. 662 (2009)	3, 20
<u>Baird v. Sabre Inc.</u> , 995 F. Supp. 2d 1100 (C.D. Cal. 2014).....	8
<u>Flores v. Adir Int'l, LLC</u> , No. CV1500076ABPLAX, 2015 WL 4340020 (C.D. Cal. July 15, 2015).....	10, 11
<u>Ibey v. Taco Bell Corp.</u> , No. 12-CV-0583-H WVG, 2012 WL 2401972 (S.D. Cal. June 18, 2012)	6, 11
<u>Knutson v. Reply!, Inc.</u> , No. 10-CV-1267 BEN WMC, 2011 WL 291076 (S.D. Cal. Jan. 27, 2011)	9
<u>Reardon v. Uber Techs., Inc.</u> , No. 14-CV-05678-JST, 2015 WL 4451209 (N.D. Cal. July 19, 2015)	6
<u>Rosal v. First Federal Bank of California</u> , 671 F.Supp.2d 1111 (N.D. Cal. 2009)	19, 20
<u>Schlegel v. Wells Fargo Bank, NA</u> , 720 F.3d 1204 (9 th Cir. 2013)	13, 14, 15
<u>Schulz v. Cisco Webex, LLC</u> , No. 13-CV-04987-BLF, 2014 WL 2115168 (N.D. Cal. May 20, 2014).....	4
<u>Steckman v. Hart Brewing, Inc.</u> , 143 F.3d 1293 (9th Cir. 1998)	7
<u>The Missing Link, Inc. v. eBay, Inc.</u> , No. C-07-04487 RMW, 2008 WL 1994886 (N.D. Cal. May 5, 2008).....	4

Statutes

15 U.S.C. § 1692.....	12
15 U.S.C. § 1692a(6)	13
15 U.S.C. § 1692c(a)	15

Page(s)

1	15 U.S.C. § 1692c(a)(1).....	12, 15, 16
2	15 U.S.C. § 1692d.....	17
3	15 U.S.C. § 1692d(5).....	12, 16, 17
4	15 U.S.C. § 1692d(6).....	12, 17
5	15 U.S.C. § 1692e(10).....	12, 18
6	47 U.S.C. § 227.....	6
7	47 U.S.C. § 227(a)(1).....	9, 10
8	47 U.S.C. § 227(b)(1)(A).....	6, 8, 9, 11
9	Other Authorities	
10		
11	7 F.C.C. Rcd. 8752 (1992).....	11
12	23 F.C.C. Rcd. 559 (2008).....	8
13	Cal. Civ. Code § 1788.....	19
14	Cal. Civ. Code § 1788.2(c).....	20
15	Cal. Civ. Code § 1788.11.....	20
16	Cal. Civ. Code § 1788.11(d).....	19
17	Cal. Civ. Code § 1788.17.....	19, 20
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

3 Defendant Guardian Protection Services, Inc. (“Defendant” or “Guardian”), by
4 and through its attorneys, Cohen & Grigsby, P.C., files the following Memorandum of
5 Points and Authorities in Support of Motion to Dismiss for Failure to State a Claim in
6 response to the Amended Complaint filed by Plaintiff Clarice Tuck (“Plaintiff”).
7

8 **I. INTRODUCTION**

9 After unsuccessfully attempting to obtain a waiver of the early-termination fee
10 required under her contract, Plaintiff filed this action against Guardian. Although the
11 allegations in Plaintiff’s Amended Complaint — and the exhibits thereto — clearly
12 show that the automated phone calls that Plaintiff received were made with her express
13 written permission in connection with the monitoring services that she had purchased,
14 Plaintiff bases her claims on federal statutes that proscribe unfair debt collection
15 practices and “automatic dialer” telemarketing calls, neither of which has any
16 application to the facts alleged. Moreover, her Amended Complaint consists largely of
17 vague and conclusory allegations that parrot the statutory language without any factual
18 support whatsoever, failing to satisfy even the minimal pleading requirements of
19 Rule 8 of the Federal Rules of Civil Procedure. Since Plaintiff has utterly failed to
20 state a single claim upon which relief may be granted, her Amended Complaint should
21 be swiftly dismissed in its entirety, with prejudice.
22
23
24
25
26
27
28

II. FACTS

Plaintiff purchased home-security services from AMP Security, an authorized dealer of products and services sold by Guardian Protection Services, Inc. (“Guardian”). Amended Complaint, Exs. C, G-1. The Monitoring Agreement stated that it could be assigned to Guardian without notice to Plaintiff. Ex. A, Monitoring Agreement, ¶ 10. Plaintiff designated her cellular phone number — the very number Plaintiff claims Guardian violated federal law by calling — as the phone number through which she wished to receive calls relating to the monitoring service. Ex. B, Sales and Installation Agreement, Section B.

Plaintiff enjoyed and paid for the security services for approximately one year before asking Guardian to waive the early termination fee. Amended Compl., Ex. B. Plaintiff claimed that she “had nothing but problems with [her] system[,]” *id.*, and that the AMP Security salesman “told [her] everything was free.” Amended Compl., Ex. D. Plaintiff forcefully “disconnected her security service equipment manually with the help of her 56[-]year[-]old son [] and threw that same equipment into the trash.” Amended Compl. ¶ 49.

Plaintiff alleges that Guardian placed 40 calls to her cell phone between February 25, 2015 and March 24, 2015 and that she had never provided Guardian with express written permission to call her cell phone number. Amended Compl. ¶ 8. Plaintiff maintains that Guardian violated the Federal Telephone Consumer Protection

1 Act, several provisions of the Federal Fair Debt Collection Practices Act, as well as the
2 California Rosenthal Fair Debt Collection Practices Act.

3 **III. STANDARD OF REVIEW**

4 “To survive a motion to dismiss, a complaint must contain sufficient factual
5 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
6 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted). To satisfy the
7 “plausibility” standard, a plaintiff must “plead[] factual content that allows the court to
8 draw the reasonable inference that the defendant is liable for the misconduct alleged.”
9 Id. (citation omitted). This requires the plaintiff to show “more than a sheer possibility
10 of unlawful conduct by the defendant.” Id. A complaint offering nothing more than
11 “‘labels and conclusions[,]. . . a formulaic recitation of the elements of a cause of
12 action...[or] naked assertion[s]’ devoid of ‘further factual enhancement’” does not
13 meet this standard. Id. (citation omitted).

14 **IV. DISCUSSION**

15 **A. Plaintiff’s Amended Complaint Makes Clear That Her Claims Are Merely** 16 **a Subterfuge Through Which Plaintiff Hopes to Address a Grievance With** 17 **Guardian’s Authorized Dealer.**

18 In her Amended Complaint, Plaintiff alleges that Guardian violated federal law
19 by engaging in unfair debt collection practices and making certain telephone calls
20 without her written authorization. To support these claims, Plaintiff attaches the first
21 page of two written agreements between her and AMP as Exhibits C and G-1 of her
22 Amended Complaint. Given Plaintiff’s reliance upon, and incorporation of, these
23

1 agreements in her Amended Complaint, Guardian has attached the agreements in their
 2 entirety, including the second page of each agreement containing Guardian's "terms
 3 and conditions."¹

4
 5 In the very first section of the agreement, the Monitoring Agreement states that
 6 it "may be assigned to Guardian Protection Services, Inc." and that "AMP and
 7 Guardian are sometimes referred to as 'Company', 'We', 'Us' or 'Our'." Ex. A,
 8 Monitoring Agreement, Section A. The very first paragraph of the Terms and
 9 Conditions echoes this right of assignment and explains clearly the relationship
 10 between AMP and Guardian. That paragraph states:

11
 12
 13 **1. GUARDIAN IS PARTY TO AGREEMENT UPON**
 14 **ASSIGNMENT.** AMP is an authorized dealer for Guardian. AMP
 15 assigns certain customer agreements to Guardian. Upon such assignment,
 16 (i) Guardian becomes a party to this Agreement and is afforded all of the
 17 rights and protections of AMP hereunder, (ii) Guardian assumes all of
 Company's duties toward You, as those duties are more fully described
 below.

18 Id., Terms and Conditions ¶ 1. Paragraph 10 further states that "We may assign this
 19 Agreement without notice to You." Id. ¶ 10. These provisions make clear that
 20 Guardian is neither a "debt collector" seeking to collect a debt nor a business with no
 21

22 ¹ Although review on a motion to dismiss is generally limited to the allegations set
 23 forth in the complaint, it is well-settled law that "[a] court may [] look outside the
 24 complaint where the outside document has been referenced by, or relied on in the
 25 complaint itself." The Missing Link, Inc. v. eBay, Inc., No. C-07-04487 RMW, 2008
 26 WL 1994886, at *3 (N.D. Cal. May 5, 2008). Courts routinely apply this doctrine to
 27 terms and conditions in consumer contracts. See, e.g., The Missing Link, Inc., 2008
 28 WL 1994886, at *3; Schulz v. Cisco Webex, LLC, No. 13-CV-04987-BLF, 2014 WL
 2115168, at *3 (N.D. Cal. May 20, 2014) ("Here, Plaintiffs allege the existence of a
 contract and allude to its contents, but do not attach the contract at issue.").

1 connection to Plaintiff seeking to solicit new business. Rather, as discussed below, the
2 allegations in Plaintiff's Amended Complaint, coupled with the exhibits attached
3 thereto when viewed in their entirety, show that Guardian is actually a party to
4 Plaintiff's contract and that it is merely living up to its end of the bargain.
5

6 Paragraphs 5 and 6 of the Monitoring Agreement that Plaintiff has attached to
7 her Amended Complaint explain that the customer's system "sends signals" to
8 Guardian's "Center," where Guardian uses "enhanced call verification for processing
9 burglar alarm signals wherein We will first try to contact You at Your Pre-Dispatch
10 Verification Phone Number[.]" Ex. A, Monitoring Agreement, ¶¶ 5-6. In the Sales
11 and Installation Agreement ("SIA") attached to Plaintiff's Amended Complaint,
12 Plaintiff designated her cellular phone number — the very number Plaintiff claims
13 Guardian violated federal law by calling — as the Pre-Dispatch Verification Phone
14 Number. Ex. B, SIA, Section B. Notwithstanding the clear articulation of the process
15 by which Guardian sends and receives signals to and from its customers' security
16 systems, Plaintiff "disconnected her security service equipment manually with the help
17 of her 56[-]year[-]old son [] and threw that same equipment into the trash." Amended
18 Compl. ¶ 49.
19
20
21
22

23 Given that the only "plausible" factual narrative that arises from Plaintiff's
24 Amended Complaint is that Plaintiff received phone calls that she had contracted to
25 receive, her claims that Guardian violated federal statutes proscribing unfair debt
26 collection practices and unauthorized telephone solicitations are patently frivolous and
27
28

1 should be summarily dismissed by this Court. Nevertheless, Guardian offers the
 2 following analysis illustrating Plaintiff's failure to plead the essential elements of these
 3 statutory claims as additional support for its Motion.

4
 5 **B. Plaintiff Has Failed to State a Claim Under the Telephone Consumer**
 6 **Protection Act.**

7 At Count V, Plaintiff alleges a claim under The Telephone Consumer Protection
 8 Act ("TCPA"), 47 U.S.C. § 227 et seq. "The TCPA's statutory and legislative history
 9 emphasize that the statute's purpose is to prevent unsolicited automated telemarketing
 10 and bulk communications.'" Ibey v. Taco Bell Corp., No. 12-CV-0583-H WVG, 2012
 11 WL 2401972, at *3 (S.D. Cal. June 18, 2012) (citation omitted).

12
 13 **1. Plaintiff provided express written consent to receive the calls.**

14 The section of the TCPA under which Plaintiff has asserted her claim applies
 15 only to calls "other than a call [] made with the prior express consent of the called
 16 party[.]" 47 U.S.C. § 227(b)(1)(A). Accordingly, "Prior express consent is a complete
 17 defense to Plaintiff[']s TCPA claim." Reardon v. Uber Techs., Inc., No. 14-CV-
 18 05678-JST, 2015 WL 4451209, at *6 (N.D. Cal. July 19, 2015) (citation omitted).

19 Any analysis of the "prior express consent" issue necessarily "begins with the Federal
 20 Communications Commission's 1992 order interpreting the TCPA," wherein the FCC
 21 stated that:

22 [p]ersons who knowingly release their phone numbers have in effect
 23 given their invitation or permission to be called at the number which they
 24 have given, absent instructions to the contrary. Hence, telemarketers will

1 not violate [TCPA rules] by calling a number which was provided as one
2 to which the called party wishes to be reached.

3 Id. (quoting In re Rules and Regulations Implementing the Telephone Consumer
4 Protection Act of 1991, Report and Order, 7 FCC Rcd 8752, 8769, ¶ 31, 1992 WL
5 690928 (Oct. 16, 1992) (the “1992 FCC Order”)). Accordingly, “[e]xpress consent
6 can be demonstrated when the called party gives her wireless number to the person
7 initiating the phone call ‘without instructions to the contrary.’” Id., at *7.

9 As discussed *supra*, Plaintiff herself chose to receive communications relating to
10 the monitoring of her security system on the same cellular phone number that she now
11 claims Guardian called without her written permission. See also Monitoring
12 Agreement, Section B (selecting “cellular” as preferred means of communication); id.,
13 Section A (listing cell phone number as 760-724-9439).² Because courts “are not
14 required to accept as true conclusory allegations which are contradicted by documents
15 referred to in the complaint[.]” Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295-
16 96 (9th Cir. 1998) (citation omitted), this Court need not accept as true Plaintiff’s
17 dubious assertion that the distress signals sent strictly in accordance with Plaintiff’s
18 Monitoring Agreement were made without her authorization. Therefore, since
19 Plaintiff “g[a]ve[] her wireless number to the person initiating the phone call ‘without
20
21
22
23

24
25 ² While Plaintiff also references a separate phone number, it appears to be by mistake.
26 The second phone number appears in only one paragraph of Plaintiff’s pleading,
27 paragraph 33, wherein Plaintiff alludes to the same 39 calls placed to the phone
28 number that she had provided Guardian, and her exhibits make no further mention of
the number.

instructions to the contrary” — indeed, under the express understanding that AMP Security, or its assignee Guardian, would initiate the very communications of which Plaintiff now complains — the calls were made with her “prior express written consent” and thus cannot be the basis of a TCPA claim under 47 U.S.C. § 227(b)(1)(A).³ See Baird v. Sabre Inc., 995 F. Supp. 2d 1100, 1106 (C.D. Cal. 2014) (finding that by providing her cell phone number to Hawaiian Airlines to facilitate her online booking of a flight, TCPA plaintiff gave express written consent to be contacted by an unrelated third-party entity with which Hawaiian Airlines had contracted to provide passengers with information about their flights, because “no reasonable consumer could believe that consenting to be contacted by an airline company about a scheduled flight requires that all communications be made by direct employees of the airline, but never by any contractors performing services for the airline.”).

³ It is also worth noting that the FCC issued an Order in 2008 specifically stating that the statute does not apply to calls made by a creditor or debt collector to a phone number provided by the called party. In that Order, the FCC cited its 1992 TCPA Order and “conclude[d] that the provision of a cell phone number to a creditor [] reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.” In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559, 568 n.34 (2008) (quoting 1992 TCPA Order, 7 FCC Rcd at 8769, para. 31). Accordingly, Plaintiff’s claim that Guardian violated the TCPA by calling the number that she had provided fails as a matter of law because in the 2008 TCPA Order, the FCC “clarif[ied] that such calls are permissible.” Id. at 564. Furthermore, because “[c]alls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call[,]” id., the result is the same regardless of whether the calls were placed by Guardian as the creditor (via assignment), by Guardian as a third-party debt collector, or by a separate third-party debt collector on behalf of Guardian.

2. **Plaintiff has failed to allege the use of an automatic telephone dialing system or an artificial or prerecorded voice.**

Plaintiff bases her claim on § 227(b)(1)(A) of the Act. That provision makes it unlawful:

to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice ...to any telephone number assigned to a [] cellular telephone service[.]

47 U.S.C. § 227(b)(1)(A).

To plead a cause of action under this particular provision of the Act, a plaintiff must allege facts that give rise to the inference that, *inter alia*, “the call was made using any automatic telephone dialing system or an artificial or prerecorded voice.” 47 U.S.C. § 227(b)(1)(A). The TCPA defines an automatic telephone dialing system (“ATDS”) as “equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers.” 47 U.S.C. § 227(a)(1). “As an isolated assertion, it is conclusory to allege that messages were sent ‘using equipment that, upon information and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.’ Such a naked assertion need not be taken as true.” Knutson v. Reply!, Inc., No. 10-CV-1267 BEN WMC, 2011 WL 291076, at *2 (S.D. Cal. Jan. 27, 2011) (citation omitted).

Here, Plaintiff pleads the conclusory allegation that Guardian made calls using an “automatic telephone dialing system,” but she provides no facts to support this

1 naked assertion. While Plaintiff suggests that the calls were made by a machine,
2 Plaintiff does not allege how this observation suggests that the calls were placed with
3 equipment meeting the statutory definition of “automatic telephone dialing system.”
4

5 In Flores v. Adir Int'l, LLC, No. CV1500076ABPLAX, 2015 WL 4340020
6 (C.D. Cal. July 15, 2015), the Court unequivocally rejected the very premise
7 underlying Plaintiff’s claim, *i.e.*, that parroting the statutory language and raising an
8 inference of some form of automation is sufficient to allege the use of an ATDS. The
9 court explained:
10

11 it may be that the use of a generic template and immediate responses
12 permit the reasonable inference that Defendant's equipment is capable of
13 some form of automation. *However, “automation” alone is not enough to*
14 *satisfy the definition of an ATDS under the TCPA.* The sort of automation
15 that matters under the TCPA is “the capacity: (A) to store or produce
16 telephone numbers to be called, using a random or sequential number
17 generator; and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1).
18 *Plaintiff’s defense to the motion to dismiss is, in essence, an argument that*
19 *alleging any measure of automation is sufficient to allege the specific*
20 *form of automation necessary to sustain a claim under the TCPA. Without*
21 *more, that inference is one that Rule 8 simply cannot bear.*

22 Id. (emphasis added).

23 Plaintiff alleges that Guardian used an “automatic telephone dialing system to
24 call the Plaintiff’s cell phone number more than 39 times[,]” Amended Compl. ¶ 53,
25 but she alleges no facts suggesting that an ATDS meeting the statutory definition was
26 used to place the calls. Like the plaintiff in Flores, Plaintiff has pled — at most — that
27 the equipment Guardian used to call her cell phone was “capable of some form of
28

1 automation.”⁴ Accordingly, Plaintiff has failed to state a claim under 47 U.S.C.
 2 § 227(b)(1)(A). See id.; Ibey, 2012 WL 2401972, at *3 (finding “[p]laintiff’s
 3 allegation that there ‘was no human intervention on the part of the [d]efendant’ does
 4 not satisfy or allege the requirements of the statute.”).

6 Moreover, the allegations in Plaintiff’s own pleading, and the exhibits attached
 7 thereto, actually defeat her contention that the calls were placed with an ATDS.
 8 Although the allegation is not pled clearly, Plaintiff avers that the calls from Guardian
 9 were specifically targeted to her for the purpose of collecting a debt. These allegations
 10 clearly suggest that the calls were *not* made with an ATDS, as they were “anything but
 11 ‘random.’” Flores, 2015 WL 4340020, at *3; see also Ibey, 2012 WL 2401972, at **1,
 12 3 (plaintiff did not allege use of an ATDS where message “did not appear to be
 13 random”). Indeed, the FCC has recognized that debt-collection calls are categorically
 14 “not autodialer calls[.]” In the Matter of Rules & Regulations Implementing the Tel.
 15 Consumer Prot. Act of 1991, 7 F.C.C. Rcd. 8752 (1992) (“With respect to concerns
 16 regarding compliance with both the FDCPA and our rules in prerecorded message
 17 _____
 18 _____
 19 _____
 20 _____

21 ⁴ Indeed, the baseless nature of Plaintiff’s claims is made clear by her conclusory
 22 allegation that Guardian used an “automatic telephone dialing system with artificial
 23 pre-recorded voice capabilities[.]” In the statute, the terms “automatic telephone
 24 dialing system” and “artificial or pre-recorded voice” represent two separate and
 25 distinct prohibitions. Likewise, the words “artificial” and pre-recorded” are used in the
 26 disjunctive, as a voice recording cannot be both artificial and pre-recorded. Thus,
 27 Plaintiff’s allegation that Guardian used an “automatic telephone dialing system with
 28 artificial pre-recorded voice capabilities” shows that the alleged factual predicate for
 her claim is at best a thoughtless parroting of the statutory language and at worst a
 physical impossibility.

calls, we emphasize that the identification requirements will not apply to debt collection calls *because such calls are not autodialer calls (i.e., dialed using a random or sequential number generator)[.]*”).

Since Plaintiff has failed to allege an essential element of her claim at Count V, and since the documents attached to her pleading show unequivocally that she provided Guardian written authorization to call her cell phone, that cause of action must be dismissed.

C. Plaintiff Has Failed to State a Claim Under the Federal Fair Debt Collection Practices Act.

Counts I through IV of Plaintiff’s Complaint allege claims under the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. All four of these claims fail as a matter of law because they only apply to people and entities who meet the statutory definition of the term “debt collector,” and Plaintiff has utterly failed to allege that Guardian satisfies those criteria. In addition to this general, across-the-board defect, each of these counts also fails due to Plaintiff’s reliance on conclusory allegations that merely track the language of the statute without supporting facts. Therefore, these claims should be dismissed.

1. Plaintiff’s claims under the Federal Fair Debt Collection Practices Act must be dismissed because Plaintiff has failed to allege that Guardian is a “debt collector” within the meaning of the Act.

Plaintiff has alleged claims under 15 U.S.C. § 1692c(a)(1), 15 U.S.C. § 1692d(5), 15 U.S.C. § 1692d(6), and 15 U.S.C. § 1692e(10). “Because these

1 prohibitions apply only to ‘debt collectors’ as defined by the FDCPA, the complaint
2 must plead ‘factual content that allows the court to draw the reasonable inference’ that
3 [Defendants are] debt collector[s].” Schlegel v. Wells Fargo Bank, NA, 720 F.3d
4 1204, 1208 (9th Cir. 2013) (citations omitted). The FDCPA defines the phrase “debt
5 collector” as: (1) “any person who uses any instrumentality of interstate commerce or
6 the mails in any business *the principal purpose of which is the collection of any debts*,”
7 or (2) any person “who regularly collects or attempts to collect, directly or indirectly,
8 debts *owed or due or asserted to be owed or due another*.” 15 U.S.C. § 1692a(6)
9 (emphasis added).

10 Here, Plaintiff has not even alleged that Guardian fulfills one of these
11 definitions. Instead, Plaintiff merely states that Guardian “is an [sic] security system
12 business entity which collects consumer debts, bringing GPS well within the ambit’s
13 [sic] of the California Rosenthal Fair Debt Collection Practices Act[.]” Amended
14 Compl. ¶ 8. Even under Rule 8’s minimal pleading standards, this broad and
15 conclusory statement is woefully inadequate.

16 Schlegel v. Wells Fargo Bank, NA, 720 F.3d 1204 (9th Cir. 2013), is instructive.
17 There, the plaintiffs supported their contention that the defendant met the statutory
18 definition of “debt collector” with the allegation that the defendant — there, Wells
19 Fargo — “is in the business of collecting debts and uses instrumentalities of interstate
20 commerce in that business.” Id. at 1208. Although the plaintiffs conceded that they
21 did not allege that Wells Fargo was engaged in a business the principal purpose of

1 which was debt collection, they argued that they clearly intended to invoke that
 2 definition. Id. at 1208-09. The Court rejected the plaintiffs’ claim, finding that their
 3 allegation “establishe[d] only that debt collection is *some part of* Wells Fargo’s
 4 business, *which is insufficient to state a claim under the FDCPA.*” Id. (emphasis
 5 added).⁵

7 The plaintiffs in Schlegel also argued that this allegation adequately pled Wells
 8 Fargo’s “debt collector” status under the second definition, *i.e.*, one “who regularly
 9 collects or attempts to collect, directly or indirectly, debts owed or due or asserted to
 10 be owed or due another.” Id. at 1209. Again, the Court rejected the plaintiffs’
 11 contention, noting that the language in the complaint “d[id] not allege that Wells Fargo
 12 collects the debts *of another.*” Id. (emphasis added).

15 Plaintiff’s allegation that Guardian is a “security[-]system business entity which
 16 collects consumer debts” suffers from the same infirmities as the allegation in
 17 Schlegel. Plaintiff has not even attempted to allege that debt collection is the principal
 18 purpose of any business in which Guardian is engaged, nor has she pled any facts from
 19 which this Court could draw such an inference. Plaintiff’s citation to her Guardian
 20 billing statements reveals the erroneous assumption underlying her FDCPA claims:
 21 that any business that collects a fee for its product or service is a “debt collector” under
 22
 23
 24

25
 26 ⁵ The Court also made clear that this definition applies only where that collection is
 27 the “principal purpose” of the company itself, not the various activities in which it is
 28 engaged. Id.

1 the Act. At most, Plaintiff's Amended Complaint "establishes only that debt collection
 2 is some part of [Guardian]'s business, which is insufficient to state a claim under the
 3 FDCPA." Id.

4
 5 Likewise, although Plaintiff's Amended Complaint claims that Guardian
 6 "collects debts," it does not allege that Guardian collects the debts "of another."
 7 Therefore, Plaintiff has failed to state a claim under the Federal Fair Debt Collection
 8 Practices Act.
 9

10 Accordingly, Counts I through IV of Plaintiff's Amended Complaint should be
 11 dismissed.
 12

13 **2. Plaintiff has not alleged a violation of § 15 U.S.C. § 1692c(a)(1).**

14 At Count I, Plaintiff alleges a claim for violation of 15 U.S.C. § 1692c(a)(1).
 15 That provision prohibits debt collectors from communicating with a consumer, without
 16 his or her express consent, about collection of a debt:
 17

18 (1) at any unusual time or place or a time or place known or which should
 19 be known to be inconvenient to the consumer. In the absence of
 20 knowledge of circumstances to the contrary, a debt collector shall assume
 21 that the convenient time for communicating with a consumer is after 8
 22 o'clock antemeridian and before 9 o'clock postmeridian, local time at the
 23 consumer's location[.]

24 15 U.S.C. § 1692c(a).

25 Here, Plaintiff alleges merely that Guardian made 40 calls to her cell phone that
 26 it "knew or should have known ... were both inconvenient, annoying, and cost her
 27 money on her phone bill." Amended Compl. ¶ 27. However, the very exhibit attached
 28

1 to Plaintiff's Amended Complaint shows that not a single one of those 40 calls took
 2 place before 8:00 AM or after 9:00 PM. Indeed, according to Plaintiff's Exhibit E, the
 3 vast majority of the calls occurred between the hours 2:30 PM and 5:00 PM, with the
 4 earliest call being 8:44 AM and the latest being 6:54 PM. Plaintiff has alleged no facts
 5 to show that Guardian should have known that something about the time or place of
 6 the calls would be inconvenient to her. Accordingly, she has failed to state a claim
 7 under 15 U.S.C. § 1692c(a)(1).
 8
 9

10 **3. Plaintiff failed to state a claim for violation of 15 U.S.C. § 1692d(5).**

11 At Count II, Plaintiff alleges a claim under 15 U.S.C. § 1692d(5). That
 12 provision prohibits a debt collector from "causing a telephone to ring or engaging any
 13 person in telephone conversation repeatedly or continuously with intent to annoy,
 14 abuse, or harass any person at the called number." 15 U.S.C. § 1692d(5).
 15

16 Plaintiff alleges, in a conclusory fashion consistent with the rest of her Amended
 17 Complaint, that Guardian violated § 1692d(5) by placing 39 calls to her cell phone.⁶
 18 However, Plaintiff's own Exhibit E shows that she was not called "repeatedly" or
 19 "continuously." Indeed, that exhibit shows that the phone never rang twice in a row,
 20 and she was never called more than two times in one day. Amended Compl., Ex. E.
 21 Therefore, Plaintiff has not stated a claim for violation of § 1692d(5). See Arteaga v.
 22
 23
 24

25 ⁶ As noted above, Plaintiff references a separate phone number in paragraph 33 of her
 26 Amended Complaint, which appears to be a typographical error. To the extent
 27 paragraph 33 articulates a separate factual basis for Plaintiff's claim, the claim must be
 28 dismissed for Plaintiff's failure to articulate any details about the alleged phone calls.

1 Asset Acceptance, LLC, 733 F. Supp. 2d 1218, 1229 (E.D. Cal. 2010) (finding that
 2 “daily” calls by debt collector, without more, “did not rise to the level of harassment
 3 under Section 1692d and fail[ed] to raise a triable issue of fact as to whether the phone
 4 calls were initiated with the intent to harass in violation of Section 1692d(5)”).

6 **4. Plaintiff has failed to state a claim for violation of 15 U.S.C.**
 7 **§ 1692d(6).**

8 At Count III, Plaintiff has alleged a claim for violation of 15 U.S.C. § 1692d(6).
 9 That provision states that it is a violation of the Act for a debt collector to place calls to
 10 a consumer “without meaningful disclosure of the caller’s identity.” 15 U.S.C.
 11 § 1692d(6).
 12

13 Here, Plaintiff merely parrots the language of the statute, stating that Guardian
 14 placed 40 calls “without meaningful disclosure of the caller GPS’s identity[.]”
 15 Amended Compl. ¶ 38. Curiously, the only allegations pertaining to the substance of
 16 these calls are inherently contradictory. Specifically, at paragraph 20, Plaintiff states
 17 that “GPS asserted ... the right to enforce or collect a debt[.]” but in the very same
 18 pleading, plaintiff alleges that “[o]n several occasions these very same calls were made
 19 without meaningful disclosure of the caller GPS’s identity[.]” Amended Compl. ¶¶ 20,
 20 38. Notably, these allegations are not pled in the alternative; both are expressly
 21 incorporated into Count III. Plaintiff’s conclusory allegation parroting the statutory
 22 language did not plead facts from which this Court could plausibly infer that Guardian
 23 placed calls to Plaintiff “without meaningful disclosure of [its] identity[.]” especially
 24
 25
 26
 27
 28

1 considering these other, inherently contradictory allegations on the matter.

2 Accordingly, Count III of Plaintiff's Amended Complaint should be dismissed.

3 **5. Plaintiff has failed to state a claim for violation of 15 U.S.C.**
 4 **§ 1692e(10).**

5 At Count IV, Plaintiff alleges a claim for violation of 15 U.S.C. § 1692e(10).

6 That provision prohibits "the use of any false representation or deceptive means to
 7 collect or attempt to collect any debt or to obtain information concerning consumer."
 8 15 U.S.C. § 1692e(10).
 9

10 Here, Plaintiff again echoes the language of the statute without providing any
 11 factual detail whatsoever. See Amended Compl. ¶ 46 (alleging that Guardian violated
 12 the statute "by the use of false representation or deception [sic] means to collect or
 13 attempt to collect a debt or to obtain information concerning consumer"). While
 14 Plaintiff alleges that Guardian "lied to [her] on numerous occasions during the months
 15 of February thru [sic] April to gain information about the Plaintiff[,]" id. ¶ 47, all of
 16 the "lies" she alleges were made, according to Plaintiff herself, exclusively by "AMP
 17 Security salesmen."⁷ Id. ¶¶ 47-48. Plaintiff's Amended Complaint is entirely devoid
 18 of any well-pled facts suggesting that Guardian used any "false representation or
 19 deceptive means" of any kind. Indeed, Plaintiff's only factual allegation against
 20 Guardian in Count IV is that Guardian continued to contact her regarding her
 21
 22
 23
 24
 25

26
 27 ⁷ It is also worth noting that Plaintiff has failed to allege that any of these alleged
 28 "lies" by AMP Security were made to collect a debt or to obtain information from her.

1 outstanding balance and refused to extinguish the debt. See id. ¶¶ 49-50. Accordingly,
 2 Count IV of Plaintiff’s Amended Complaint must be dismissed.

3 **D. Plaintiff Has Failed to State a Claim Under the California Rosenthal Fair**
 4 **Debt Collection Practices Act.**

5 At Count VI, Plaintiff purports to state a claim under the California Fair Debt
 6 Collection Practices Act, Cal. Civ. Code § 1788 et seq., alleging a violation of
 7 § 1788.11(d) and § 1788.17. The former prohibits a debt collector from attempting to
 8 collect a debt by “causing a telephone to ring repeatedly or continuously to annoy the
 9 person called.” Cal. Civ. Code § 1788.11(d). The latter provides a remedy against
 10 debt collectors who violate the federal Fair Debt Collection Practices Act. See id.
 11 § 1788.17. Both claims fail for several reasons.

12 First, “[t]o be held liable for violation of the RFDCPA, a defendant must fall
 13 within the Act’s definition of ‘debt collector.’” Rosal v. First Federal Bank of
 14 California, 671 F.Supp.2d 1111, 1135 (N.D. Cal. 2009) (citations omitted). That
 15 definition is “any person who, in the ordinary course of business, regularly, on behalf
 16 of himself or herself or others, engages in debt collection.” Id. (quoting Cal. Civ. Code
 17 § 1788.2(c)).

18 Here, as noted above, Plaintiff alleges merely that Guardian “is an [sic]
 19 security[-]system business entity which collects consumer debts.” Amended Compl.
 20 ¶ 6. Plaintiff has pled no facts suggesting that Guardian “collects debts” of any kind
 21 “in the ordinary course of business,” nor has she made any allegations that Guardian
 22

engages in this activity “regularly.” Cal. Civ. Code § 1788.2(c). Even coupled with the conclusory and inaccurate assertion that “collecting debts,” without more, “bring[it] well within the ambit’s [sic] of the California Rosenthal Fair Debt Collection Practices Act[,]” Amended Compl. ¶ 6, this bare allegation falls far short of the pleading standards set forth by Iqbal. Because Plaintiff “does not allege facts giving rise to the inference that any of the defendants is a debt collector as defined by the RFDCPA,” she “has not satisfied the minimal notice pleading requirements of Rule 8.” Rosal, 671 F. Supp.2d at 1135.

Moreover, Plaintiff has not adequately alleged conduct violating the two provisions upon which she bases her claims. Specifically, as noted *supra*, Plaintiff’s own exhibit shows that she never received more than two calls in a single day, and no calls were placed back to back. Thus, Guardian did not cause Plaintiff’s phone to ring “repeatedly or continuously to annoy” her. See Arteaga, at 1229 (finding that “daily” calls by debt collector, without more, “fail[ed] to raise a genuine issue of material fact as to whether [debt collector]’s communications were so frequent as to be unreasonable or to constitute harassment under the circumstances” and dismissing the plaintiff’s Rosenthal Act claims). As for Plaintiff’s allegation that Guardian violated § 1788.17, this claim fails because Plaintiff has failed to allege a violation of the Federal Fair Debt Collection Practices Act, for the reasons discussed herein.

Accordingly, Plaintiff has not pled a claim under § 1788.11 or § 1788.17 of the California Rosenthal Fair Debt Collection Practices Act.

V. CONCLUSION

For the reasons set forth herein, Defendant respectfully requests that this Honorable Court dismiss Plaintiff's Amended Complaint, with prejudice.

Dated: December ____, 2015

Respectfully submitted,

COHEN & GRIGSBY, P.C.

By: s/ Robert M. Linn

Robert M. Linn (SBN 190387)

625 Liberty Avenue

Pittsburgh, PA 15222-3152

rlinn@cohenlaw.com

(412) 297-4900

(412) 209-0672 (fax)

Attorneys for Defendant

Guardian Protection Services, Inc.

2195068.v1

1 Clarice Tuck v. Guardian Protection Services, Inc.
2 United States District Court Case No. 15-CV-1376-JLS(JLB)

3
4 **CERTIFICATE OF SERVICE**

5 I, Robert M. Linn, hereby certify that I caused to be served upon the Plaintiff a
6 copy of the following document:

- 7 • **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**
8 **OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

9 via U.S. Mail, First Class, at Plaintiff's last reported address as follows:

10 Clarice Tuck
11 1600 E. Vista Way #110
12 Vista, CA 92084

13 Executed on **December** __, **2015**, in Pittsburgh, Pennsylvania.

14
15
16 s/ Robert M. Linn
17 Robert M. Linn
18
19
20
21
22
23
24
25
26
27
28